

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID R. PECK, TRUSTEE OF THE
TAMALPAIS PROPERTY TRUST,

Plaintiff,

v.

PER BESSING, ANTON C. POGANY, JEAN
C. POGANY, EDWARD J. FOTSCH, GOLDEN
GATE NATIONAL RECREATION AREA,
NATIONAL PARK SERVICE, GOLDEN GATE
BRIDGE AND HIGHWAY DISTRICT and
DOES ONE through THIRTY,

Defendants.

No. 05-0960 SC

ORDER GRANTING
DEFENDANTS NATIONAL
PARK SERVICE'S AND
GOLDEN GATE NATIONAL
RECREATION AREA'S
MOTION FOR JUDGMENT
ON THE PLEADINGS

I. INTRODUCTION

Plaintiff David Peck ("Plaintiff" or "Peck") filed this action on March 7, 2005, alleging five causes of action against various defendants as a result of a landslide that occurred on March 7, 2002, causing damage to two properties that Plaintiff owns in Sausalito, California. Defendants National Park Service ("NPS") and Golden Gate National Recreation Area ("GGNRA"; collectively, the "Federal Defendants") now move this Court for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("FRCP") 12(c). For the reasons set forth below, the Court hereby GRANTS the Federal Defendants' motion and DISMISSES the Federal Defendants from this action.

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II. BACKGROUND

Plaintiff is the trustee of the Tamalpais Property Trust, which owns and manages two properties located at 1 and 7 Alexander Avenue in Sausalito, California. Complaint ¶ 4 ("Compl."). On March 7, 2002, a landslide originating in the GGNRA slid into Plaintiff's properties, allegedly causing damage to the properties and rendering the residence at 1 Alexander Avenue uninhabitable until the slide zone is fully repaired. Compl. ¶¶ 27, 30. Peck alleges that the unstable conditions that contributed to triggering the landslide were caused, at least in part, by the diversion of water runoff onto GGNRA land by the individual Defendants in this action that live uphill from Plaintiff's Alexander Avenue properties. Id. ¶¶ 33-35. Plaintiff has further alleged that the GGNRA was negligent in allowing the individual defendants to divert water runoff onto GGNRA land and in failing to maintain GGNRA land in a manner that would prevent landslides. Id. ¶¶ 64-88. Finally, Peck asserts that the GGNRA breached a statutory duty to maintain the park land in a manner that would protect Plaintiff's downhill properties. Id. ¶¶ 90-95.

III. LEGAL STANDARD

Under FRCP 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Courts considering such motions must accept the allegations of the non-moving party as true, and must assume that allegations made by the moving party that have been denied are false. Hal Roach Studios v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989). Judgment on the

pleadings is inappropriate unless the moving party clearly establishes that no material issue of fact remains to be decided and that he is entitled to judgment as a matter of law. Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984).

IV. DISCUSSION

A. Sovereign Immunity and The Federal Tort Claims Act

The Federal Defendants assert that they are entitled to judgment on the pleadings because, as agencies of the federal government, they enjoy sovereign immunity from suits sounding in tort except as provided by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 ("FTCA"). See Defendants' Motion for Judgment on the Pleadings at 3 ("Def. Mot."). The Federal Defendants further contend that because the United States has not "unequivocally expressed" a waiver of sovereign immunity, and because Peck has not complied with the procedural requirements of the FTCA, that sovereign immunity divests this Court of subject matter jurisdiction over Peck's claims against the GGNRA and NPS. Id.

In response, Peck contends that the FTCA does not apply to actions seeking equitable relief because, by its terms, the FTCA speaks only to "claims[s] against the United States for money damages...." See Plaintiff's Opposition to Motion for Judgment on the Pleadings at 4 ("Pl.'s Opp."); 28 U.S.C. § 2675(a). Plaintiff argues that the procedural requirements imposed by the FTCA are therefore inapplicable to his causes of action against the Federal Defendants that seek only injunctive relief. See id.

The Court finds that Plaintiff, perhaps unwittingly, has

1 succinctly stated why its claims cannot proceed against the
2 Federal Defendants. Because the FTCA sets forth the sole
3 procedure under which a plaintiff may sue agencies of the United
4 States government absent a waiver of immunity, the fact that the
5 FTCA does not reference claims seeking equitable relief
6 establishes that such claims are not cognizable under the FTCA.
7 See Westbay Steel, Inc. v. United States, 970 F.2d 648, 651 (9th
8 Cir. 1992); Smith v. Potter, 187 F. Supp. 2d 93, 98 (S.D.N.Y.
9 2001). Because Peck does not seek relief from the Federal
10 Defendants that is within the limited scope of actions
11 contemplated by the FTCA, sovereign immunity precludes this Court
12 from assuming jurisdiction over Peck's claims. See Jerves v.
13 United States, 966 F.2d 517, 519 (9th Cir. 1992).

14 Perhaps realizing that his primary argument is entirely off
15 base, Peck asserts that, in the alternative, he should be granted
16 leave to amend his complaint so as to assert a claim against the
17 Federal Defendants that seeks money damages. See Pl.'s Opp. at 4.
18 However, even if Peck were to assert a claim seeking money
19 damages, the Court could not assume subject matter jurisdiction
20 over that claim until it has been presented to the relevant
21 federal agency and denied or is deemed denied by the passage of
22 six months. 28 U.S.C. § 2675(a).¹ The Court therefore declines
23 to grant Peck leave to amend his complaint because Peck cannot, at

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25 ¹ Additionally, the Court notes, without deciding, that
26 because any claim for money damages Peck could potentially assert
27 would be subject to the two-year statute of limitations governing
28 tort actions against agencies of the federal government, pursuit of
an administrative claim at this point would likely be futile. See
28 U.S.C. § 2401(b).

1 this time, add any new claim over which this Court could assert
2 subject matter jurisdiction.

3 B. Waiver of Immunity Under the Administrative Procedures
4 Act and the National Park Service Organic Act

5 Although Peck does not specifically reference the
6 Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"),
7 that statute provides a waiver of sovereign immunity for
8 plaintiffs seeking equitable relief against the United States
9 government. See 5 U.S.C. § 706(1) & (2). Where a plaintiff seeks
10 to compel an agency to take action, the APA will effect a waiver
11 of immunity only where the "agency failed to take a discrete
12 agency action that it is *required to take*." Norton v. Southern
13 Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).

14 In his opposition papers, Peck asserts that the National Park
15 Service Organic Act, 16 U.S.C. § 1, provides the sort of mandatory
16 and specific guidance for agency action that would effect a waiver
17 of sovereign immunity with respect to plaintiffs seeking to compel
18 federal agencies to take such action. See Pl.'s Opp. at 4-6. The
19 National Park Service Organic Act directs the NPS to maintain the
20 National Parks in a manner consistent with the purpose of the
21 Parks, defined as:

22 to conserve the scenery and the natural and historic objects
23 and the wild life therein and to provide for the enjoyment of
24 the same in such manner and by such means as will leave them
unimpaired for the enjoyment of future generations.
16 U.S.C. § 1.

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26 Because allowing "the unnatural water flow and landslide
27 damage risk" is inconsistent with the purpose of the National
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1 Parks, Peck argues, the United States has waived its immunity with
2 respect to plaintiffs in Peck's position who seek to compel the
3 Federal Defendants to restore the portion of the GGNRA that
4 allegedly continues to pose a danger of future landslides. See
5 Pl.'s Opp. at 6.

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7 The Court disagrees. There is nothing in the National Parks
8 Organic Act that requires a federal agency to take discrete and
9 specific action. See 16 U.S.C. § 1; Sierra Club v. Andrus, 487 F.
10 Supp. 443, 448 (D.D.C. 1980)(noting that "nowhere in either [16
11 U.S.C. §§ 1 or 1a-1] is there a specific direction as to how the
12 protection of Park resources and their federal administration is
13 to be effected."). Rather, the statute speaks in general terms
14 that confer wide discretion upon the NPS in deciding how best to
15 fulfill the statute's mandate. Peck can identify no portion of 16
16 U.S.C. § 1--or of any other statute for that matter--that would
17 direct the NPS or GGNRA to take the sort of specific action sought
18 by Peck in this suit. Accordingly, the Federal Defendants have
19 not waived their sovereign immunity under the APA, and this Court
20 does not have subject matter jurisdiction over Peck's claims
21 asserted against the Federal Defendants.

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1 **V. CONCLUSION**

2 Plaintiff has failed to demonstrate a waiver of sovereign
3 immunity by the Federal Defendants in this case, either under the
4 Federal Tort Claims Act or the Administrative Procedures Act.
5 Accordingly, this Court may not assert subject matter jurisdiction
6 over Plaintiff's claims against the Federal Defendants. The Court
7 therefore GRANTS Defendants' motion for judgment on the pleadings
8 and DISMISSES the Federal Defendants from this action.
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11 IT IS SO ORDERED.

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13 Dated: January 27, 2006



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UNITED STATES DISTRICT JUDGE